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Reply Brief of Attorney General (Richards & Olcott) for Appellant.

Filed Dec. 11, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

I. STANTON CARTER, ON BEHALF OF Oberlin M. Carter, appellant,
v.
ROBERT W. MCCLAUGHRY, WARDEN, etc.
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BRIEF IN REPLY FOR THE APPELLEE.

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With reference to the third charge, we call the attention of the court to what is said in second Winthrop's Military Law, second edition, top page 1116:

> It is to be remarked that while article 62 is intended to cover only offenses not cognizable under the other articles, article 61 embraces offenses made punishable by *any other article*, provided such offenses be characterized in their commission by circumstances so dishonorable or disgraceful as to bring them within the definition of "conduct unbecoming an officer and a gentleman."

Such offenses, it is pointed out, may be presented under both articles.

Passing by other points as to military procedure referred to in the reply brief for the appellant, for the reason that in our opinion they have already been sufficiently discussed, let us briefly refer to the new propositions advanced.

I.

It is now for the first time insisted that if the contracts of 1896 were fraudulent—that is, were secured in pursuance of a conspiracy on the part of Carter and the contractors to defraud the Government—then no matter how fraudulent and criminal the conduct of Carter was during the execution of these contracts, such conduct can not be punished because the contracts were void *ab initio*. This is a remarkable proposition. According to this, fraud carries with it indulgence; any acts done in carrying out a conspiracy to defraud are committed with impunity. Is it necessary to call attention to the fact that those who conspire may be punished not only for the conspiracy, but for the criminal acts committed in carrying it out? Or to the other rule, that no man can take advantage of his own wrong, and that the contracts of 1896, however fraudulent in intent, were yet valid and binding in favor of the Government as against the conspirators? Carter may have committed a crime in conspiring with the contractors to secure them contracts at extravagant prices, and then he may have committed an additional crime in fraudulently accepting work and material which he knew was not in accordance with the specifications of these contracts, but different in quality and cost, and still another crime in fraudulently approving and paying false accounts for alleged work done and material furnished under the contracts.

II.

It is insisted that because article 62 has been in force since the Revolution and section 5488 was enacted as late as 1866, the offense described in the latter section can not be incorporated into or charged under the former article. But article 62 is a comprehensive provision, and the charge of "embezzlement as defined in section 5488, Revised Statutes," is merely a short method of referring to certain acts described in the specification. These words may be rejected as surplusage. The charge is really that Carter committed an offense in violation of the sixty-second article of war, namely, an offense to the prejudice of good order and military discipline "not mentioned in the foregoing Articles of War." This offense is described in the specification. It is averred that Carter, being the officer in charge for the United States of the river and harbor improvements in the Savannah district, and as such, being a disbursing officer of the United States, and having intrusted to him large amounts of public money of the United States, "did willfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so intrusted to him" by willfully and knowingly causing certain amounts to be paid out of such moneys, the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the parties or to anyone, and Carter well knowing this to be the case.

Now, it is perfectly proper to attack this specification, as was done by opposing counsel on the oral argument, by insisting either that the offense was not to the prejudice of good order and military discipline or was covered by the sixtieth article of war. But it is possible to overthrow it on no other ground.

III.

It is urged that Carter was not a disbursing officer; that he was a purchasing agent; and that what he has been convicted of was a mere error of judgment in passing upon the quality of certain materials. This is another of the astonishing propositions which one is at a loss adequately to characterize. Because section 5488 (according to counsel's contention) might be construed in some other case to cover a misapplication of Government funds without fraudulent intent, therefore it is insisted that Carter has been convicted of a mere error of judgment, notwithstanding the fact that the court-martial, in finding him guilty, determined in every instance that he had acted with fraudulent intent. Every charge and specification sustained and upon which the sentence now rests contains the definite and distinct averment that he acted with fraudulent intent.

The first charge is that *he conspired to defraud the United States* by aiding the Atlantic Contracting Company to obtain the payment of certain fraudulent claims in violation of the sixtieth article of war.

The second charge is that *he caused certain false and fraudulent claims to be made against the United States*

by permitting the Atlantic Contracting Company to furnish work and material different from and inferior to that contracted for, and by falsely certifying to the vouchers therefor, in violation of the sixtieth article of war.

The third charge is that *he willfully caused certain accounts to be paid out of the moneys of the United States* subject to his control, *the accounts being false*, and he well knowing this to be the fact, in violation of the sixty-first article of war.

The fourth charge is that Carter, being the officer in charge of the improvements in the Savannah district, and, as such, a disbursing officer of the United States, and having intrusted to him large amounts of public money, *did willfully and knowingly apply for a purpose not authorized by law large sums of such money*, by causing certain amounts thereof to be paid out *on certain accounts which were false*, and which he knew were false, the amounts paid not being due or owing from the United States to the parties or to anyone, in violation of the sixty-second article of war.

One can not hear or read the extraordinary propositions of counsel without recalling the words of Danton:

> Il nous faut de l'audace, et encore de l'audace, et toujours de l'audace.

IV.

The penalty clause which applies upon conviction attaches not to the specifications but to the charge. There were four charges and many specifications. A

number of specifications were eliminated by pleading the statutes of limitations. The court found Carter guilty of the first charge and one specification under it; of the second charge and five specifications under it; of the third charge and nine specifications under it; and of the fourth charge and one specification under it. Upon the recommendation of the Attorney-General (22 Opinions, 589), the President approved of all these findings except specifications 7, 8, 9, and 10, under charge two, which the court will find upon examination were of minor importance, and specifications 3, 4, 5, 6, 7, 9, 11, and 22, under charge three, which were obviously immaterial for the reason that under the charge there could be but one punishment inflicted, that of dismissal. Thus there remained, approved by the President, a conviction under each charge supported by one specification. It is to be observed that each of these charges grew out of the same general transaction, the conspiracy to defraud through the contracts of October 8, 1896, for the improvement of Savannah Harbor and Cumberland Sound. The false and fraudulent claims which Carter caused to be made, and thereafter willfully and knowingly paid, and the moneys of the Government which he willfully and knowingly misapplied were large in amount, in the Savannah Harbor contract, $230,749.90, and in the Cumberland Sound contract, $345,000.

If, therefore, the punishment inflicted was not in excess of the maximum possible under valid charges, the

sentence must be sustained The ends of justice so require. It is not to be presumed that even if there had not been, for example, a conviction under the fourth charge, the sentence would have been different. The *Ballew case* (160 U. S., 187) was remanded in the exercise of statutory authority and in furtherance "of substantial justice." There is no statute warranting such a course in this case and substantial justice would be defeated instead of promoted by applying it. To what tribunal could this case be remanded for a new sentence under the rule in the *Ballew case?* To the court-martial? But the sentence of the court-martial was merely provisional. It amounted to a mere recommendation. It took effect only upon the approval of the President. The President, therefore, really pronounced the sentence, and under the pardoning power the President has authority at any time to mitigate it, if the ends of justice should so require. There is no room here for the application of the rule in *Ballew's case.* The decision in the *Ballew case* has not been regarded as overruling the well-settled rule of the Federal courts, that where there is a verdict of guilty upon a number of counts and the sentence imposed does not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient. *Claassen* v. *United States*, 142 U. S., 140, 146; *Evans* v. *United States*, 153 U. S., 595, 609; *Peters* v. *United States*

(1899), 94 Fed. Rep., 127, 134; *Jewett* v. *United States* (1900), 100 Fed. Rep., 832, 836. This court denied applications for certiorari in both the *Peters* (176 U. S., 684) and the *Jewett* (179 U. S., 683) cases.

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